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Supreme Court of the United States

OCTOBER TERM, 1955

No. 527

ESTATE OF HENRY M. MARKS, ET AL.,
Petitioners,

versus

R. D. MACKINTOSH, ET AL.,
Respondents.

BRIEF OF R. D. MACKINTOSH, ET AL, RESPONDENTS, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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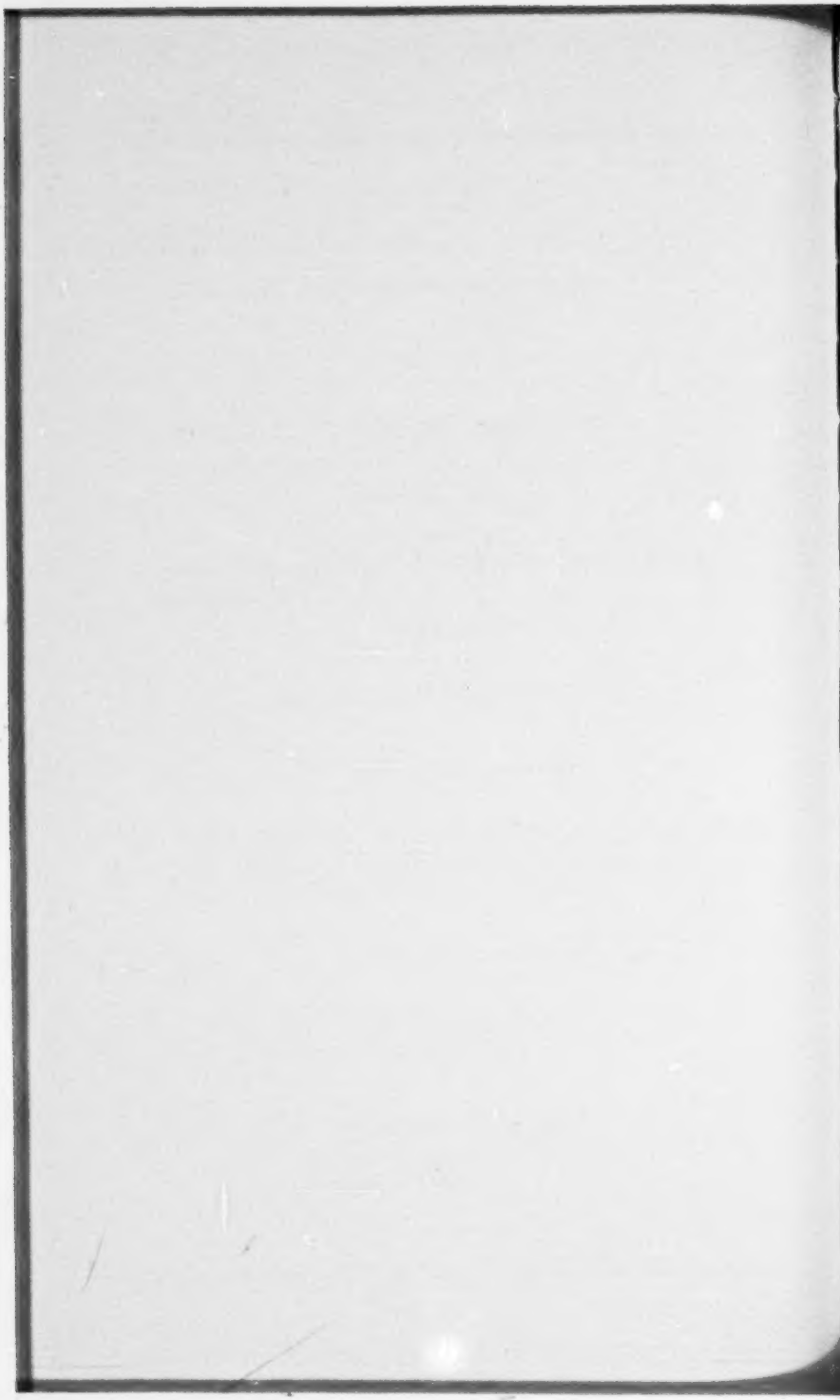

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May It Please the Court:

Since the petition for a writ of certiorari filed in this matter fails to make clear the entire factual situation in connection with this litigation we are including in this brief a more or less detailed statement of the facts as alleged in the complaint.

THE FACTS AS ALLEGED IN THE COMPLAINT

Certain residents of the State of Texas and of the State of Missouri, as plaintiffs, brought suit against certain residents of the States of Mississippi, Louisiana, Colorado and a corporation incorporated under the laws of the State of California. The jurisdiction of the Federal Court is founded on a diversity of citizenship. The

requisite monetary amount was alleged.

The plaintiffs were either the owners or the heirs of owners of certain real estate situated within the jurisdiction of the United States District Court for the Western District of Louisiana.

The complaint alleges that Henry M. Marks, deceased, whose executor is a defendant, acting in consort with certain agents and employees of the defendant, The California Company, devised a scheme to defraud the "owners" of certain land situated in Tensas Parish, Louisiana, and of most of the minerals thereunder. That the scheme contemplated that agents and employees of The California Company would represent to the "owners" that the "owners" title to their property was fatally defective and that Marks had a superior title to the property, but that if the "owners" of the property would convey the property to Marks he would re-convey to them a one-half interest in the minerals thereunder and that The California Company would thereafter take a joint oil, gas and mineral lease from both the "owners" and from Marks.

It is alleged that at the time the scheme to defraud was confected and subsequently, when it was carried into execution, both Marks and The California Company well knew that Marks had no title whatever to the property nor was he in possession thereof, and that there would therefore be no consideration for the transfer to Marks. That as a part of the scheme it was contemplated that by using an employee and representative of The California Company, a major oil company, the "owners" would be lulled into a belief that the statements made to them were true and would thus induce the "owners" to

sign the compromise agreement transferring the property to Marks without any investigation. That by this means The California Company would secure the oil, gas and mineral lease which they desired.

That thus relying upon the representations made to them by the representatives of The California Company the "owners" signed a contract, grant, compromise agreement and also signed an oil, gas and mineral lease. That the contract, grant and compromise agreement, as well as the oil, gas and mineral lease, were prepared under the directions of the defendant, John Dale, Jr., who was acting as the attorney for both the defendant, Marks, and the defendant, The California Company. That thereafter Marks made transfers to John Dale, Jr., Thomas M. Wade, Jr. and Philip Watson, all attorneys, of certain undivided interests, both in the real estate and in the minerals, the consideration for the transfer being legal services in connection with securing the title to the real estate. Later, the defendant, Thomas M. Wade, Jr., transferred a portion of his interest in both the lands and the minerals to the defendant, Mrs. Kate Lacour Wade, as a settlement of Mrs. Wade's rights in community after their divorce.

The suit seeks to set aside and annul:

1. The contract, grant and compromise agreement dated June 26, 1940 between the "owners" and Henry M. Marks, and
2. The oil, gas and mineral lease in favor of The California Company signed by both the "owners" and by Marks.

These two documents are entirely separate and distinct instruments, the compromise agreement being re-

corded in Book BB, page 525 of the records of Tensas Parish, Louisiana, and the mineral lease being recorded in Book BB, page 529 of the records of Tensas Parish, Louisiana. These two documents are the underlying or basic instruments which were sought to be cancelled. However, in addition to the cancellation of these documents plaintiffs also seek to set aside:

3. Transfer from Henry Marks to John Dale, Jr. of certain interests in the fee and in the minerals;

4. Transfer from Henry Marks to Thomas M. Wade, Jr. of certain interests in the fee and in the minerals;

5. Transfer from Henry Marks to Philip Watson of certain interests in the fee and in the minerals; and

6. Transfer from Thomas M. Wade, Jr. to Mrs. Kate Lacour Wade of certain interests in the fee and in the minerals.

IN ADDITION to the cancellation of the six instruments recited above the prayer of the complaint asked for judgment for the amount of all royalties which had been paid to Henry M. Marks, or to his estate; for the amount of all royalties paid to John Dale, Jr.; for the amount of all royalties paid to Thomas M. Wade, Jr.; for the amount of all royalties paid to Philip Watson and for the amount of all royalties paid to Mrs. Kate Lacour Wade. The complaint also demanded judgment against The California Company for the value of all minerals which had been produced and extracted from the property, subject to the costs of drilling and production. The prayer of the complaint further demanded that in the event that it was impossible for any of the defendants

to return the interest which had been conveyed to them that a monetary judgment be rendered against the defendants for the valuee of the interest which they were unable to re-convey. Finally plaintiffs seek a judgment against all of the defendants for reasonable attorneys fees and exemplary damages in the amount of $100,000.00.

THE DEFENSE

The various defendants filed motions for a more definite statement and after these motions were overruled, filed answers.

It is important from a factual standpoint to note that despite the allegation of the complaint (paragraph 11—Transcript page 6) "that Henry M. Marks had no title whatever to the said property nor was he in possession thereof;" none of the defendants in their answers have set up either title or possession in Marks as a basis of consideration for the compromise agreement.

After the taking of the testimony of many witnesses, the defendants filed motion for summary judgments and motion to compel the joinder of indispensable parties and to dismiss for lack of jurisdiction. In connection therewith and in support of these motions the defendants filed exhibits which consisted of mineral assignments made by both plaintiffs and defendants to third parties who were residents of various states, including but not limited to Texas, Mississippi and Missouri.

The defendants contended that the assignees of these mineral interests were "indispensable parties" and that since some of the assignees were residents of the same states as were the plaintiffs while others were residents

of the state of one of the defendants, that there was a failure of diversity and the District Court had no jurisdiction.

On April 14, 1954 the District Court in passing upon the motion for summary judgment and motion to compel joinder of indispensable parties and dismiss for lack of jurisdiction entered the following order:

> "The complainants will, therefore, be required to make all of the persons having or claiming any interest in the lands, mineral leases or royalties in the property involved, parties to this suit within a period of twenty days and in default thereof the case will stand dismissed."

Plaintiffs thereafter filed a motion for a new trial and/or amendment of judgment, the motion for a new trial having been denied, and the plaintiffs refusing to join the additional parties a decree was entered dismissing plaintiffs' suit. From this dismissal plaintiffs prosecuted an appeal to the United States Court of Appeals for the Fifth Circuit.

THE APPEAL

The plaintiffs perfected their appeal to the United States Court of Appeals for the Fifth Circuit and the specification of errors relied on in that Court were as follows:

> "(a) The Court erred in its order of April 14, 1954 in which it required the plaintiffs to make all persons having or claiming any interest in the lands, mineral leases or royalties in the property involved, parties to this suit, since to do so would have resulted in destroying the diversity of citizenship requisite for the jurisdiction of this Court;

(b) The Court erred in not limiting its order to the claim for the cancellation of the oil, gas and mineral lease since this claim alone was the only one of several against which the motion to compel the joining of indispensable parties could properly be urged;

(c) The Court erred in not dismissing plaintiffs' claim for a cancellation of the oil, gas and mineral lease and allowing plaintiffs to proceed to trial on the various other claims against all of the named defendants."

After a hearing the Court of Appeals for the Fifth Circuit rendered a decree on August 26, 1955, which decree reversed the District Court and remanded the case to the District Court with instructions "to retain jurisdiction and limit any relief granted to such as can be given without prejudice to the absent parties". Appellees then filed a petition for a rehearing which rehearing was denied on September 28, 1955. After the mandate had been sent to the District Court appellees secured an order recalling and staying the mandate for a period of thirty days so that they might apply for writs of certiorari to this Court.

QUESTIONS PRESENTED ON THE PETITION FOR WRIT OF CERTIORARI

The petitioners have stated that there were four questions raised in their petition for writs of certiorari and for the convenience of the Court we are copying these questions in this brief and will attempt to answer each one. The questions are:

"(1) Whether in a suit to cancel for fraud a deed and a mineral lease, successors in interest of the parties to that deed and lease are indispensable parties where the complainants have

also prayed for monetary relief.

(2) Whether the judgment of the Court of Appeals denies to Petitioners due process of law, in contravention of the Fifth Amendment to the Constitution of the United States of America by denying to Petitioners the protection of the procedural rule of indispensable parties, and by permitting respondents to remain in court by belatedly seeking to amend the gravamen of their complaint for the first time in the Court of Appeals on their appeal from a judgment of dismissal rendered by the District Court.

(3) Whether Rule 54(c) of the Federal Rules of Civil Procedure, 28 U.S.C. warrants the judgment rendered by the Court of Appeals.

(4) Whether the construction placed upon the public registry laws of the State of Louisiana by the Court of Appeals for the Fifth Circuit requires that those laws be declared unconstitutional as violative of the prohibition against impairment of the obligations of contract contained in Article I, Section 10 of the Constitution of the United States of America."

CAN THE COURT RENDER A JUDGMENT FOR MONETARY RELIEF AGAINST THE NAMED DEFENDANTS WITHOUT THE JOINDER OF ADDITIONAL PARTIES

While the petitioners in their petition (Page 3) have stated that the questions presented were:

> "Whether in a suit to cancel for fraud a deed and a mineral lease, successors in interest of the parties to that deed and lease are indispensable parties where the complainants have also prayed for monetary relief"

they have failed to discuss this question. Under Rule

8-E (2)[1] and Rule 18-A[2] of the Federal Rules of Civil Procedure it is provided that separate claims against multiple parties can be joined in one complaint, the restriction in Rule 20[3] being that they must arise out of the same transaction, occurrence or series of transactions or occurrences. It was therefore proper under the alleged facts to join all of the various named defendants and to seek the several **reliefs** demanded in the complaint.

As we understand the law, the Court will not dismiss a suit if there is any claim properly pleaded upon which affirmative relief can be granted.

In *Hudson, et al v. Newell, et al*, 172 F. (2d) 848 (CCA 5th Cir) the Court said:

> "We are of the opinion that Federal jurisdiction exists in each of the four suits as they are brought, complete diversity existing and the principal amount involved being sufficiently alleged to be more than $3,000.00 **THE RELIEF**

[1] Rule 8-E (2) Federal Rules of Civil Procedure: " . . . A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in Rule 11."

[2] Rule 18-A Federal Rules of Civil Procedure: "Joinder of Claims. The plaintiff in his complaint or in a reply setting forth a counterclaim and the defendant in an answer setting forth a counterclaim may join either as independent or also alternate claims as many claims either legal or equitable or both as he may have against an opposing party. There may be a like joinder of claims when there are multiple parties if the requirements of Rules 19, 20, and 22 are satisfied. There may be a like joinder of cross-claims or third-party claims if the requirements of Rules 13 and 14 respectively are satisfied."

[3] Rule 20-A Federal Rules of Civil Procedure: "Permissive Joinder: All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action."

PRAYED IN MULTIFORM. The original complaint asked a decree that the plaintiffs are the true owners of the land and of the mineral rights therein and of the oil and gas removed from it by the defendant oil company. If they can prove the land and oil are theirs we see no reason why they should not have judgment for them against those sued; possible claimants not in Court would not, of course, be bound by the result. If such claimants' title is shown as a defense their interests can be saved from the decree. But the next prayer that all of the adverse deeds be cancelled cannot be granted if there are any persons interested under them who are not before the Court. The prayer that the oil company discover what oil they have taken out can be granted if the plaintiffs prove they have some interest in it, though not the whole interest.

"* * * WE THEREFORE HOLD THAT WHILE THE FULL RELIEF PRAYED CANNOT BE GIVEN WITH ONLY THE PARTIES BEFORE THE COURT A LIMITED RELIEF CAN BE, AND THE SUIT SHOULD BE RETAINED TO ENQUIRE INTO IT." (Emphasis ours)

If various claims are joined in a complaint and the Court finds that it may not grant relief on every claim it may render appropriate orders dismissing those claims upon which no relief may be granted and proceed to a determination of those upon which it may properly grant relief.

This then poses the question, can the Court render a judgment on any of the demands prayed for in the original complaint in the instant case without joining additional parties.

It seems to the writers of this brief that it is Horn-

book law that a Federal Court has jurisdiction, to adjudicate a controversy, there being the proper diversity and monetary requisites present, and the facts being:

> A sues B for the fraudulent conversion, through the use of the "confidence game", for the return of A's one hundred shares of United States Steel stock and the dividends collected, or, alternately in the event that B cannot return the stock, for the value of the stock and for such dividends as B may have received thereon.

Can it be said that because B has alienated fifty shares of the stock to C, that C is a necessary party and that A cannot secure a judgment against B for those shares still remaining in B's name and for the value of the stock which B cannot return.

We believe that the above example poses an exact parallel to the instant case. In the instant case we have not sought, in any way, to effect the assignments made by Marks except those made to this attorneys who had full knowledge of the fact that Marks had neither title to nor possession of the property and which knowledge was amply demonstrated by the Exhibits, filed in the Circuit Court of Appeals in the original, but which Exhibits were not filed in connection with the petition for writs of certiorari. As to the fraudulent intent of the defendants Marks and Wade a quotation from a letter from Marks to Wade under date of January 30, 1940 (Plaintiff Exhibit—Wade 13) is most explanatory.

> "I explained to Homer Thompson, the oil company's (California) representative that **I actually had no valid title.**" (Explanation and emphasis ours)

And in reply thereto a letter from the defendant

Wade to the defendant Marks under date of February 2, 1940 as follows:

> "I am sure that you understand that I was somewhat at a loss to know just how to talk to Mr. Thompson for the reason that I did not want to explain the full details concerning your claim to the land and so I had to be rather vague in what I said. As a matter of fact **you have no title whatever** to the land at this time and any lease they might take from you would not hold water. However if by giving them a lease it would prevent them from attempting to get in touch with the **real owners** of the property, then it might be best for you to do so under the circumstances." (Plaintiffs Exhibit—Wade 14) (Emphasis ours)

We have pointed out the above evidence and have called the Court's attention to the failure of the defendants to assert title in Marks, for the reason that the defendants, both in their brief in the Court of Appeals, and in their petition to this Court, have suggested that the decision in the instant case could effect, in some undisclosed way, the title of one of the mineral owners. NOTHING COULD BE FURTHER FROM THE TRUE FACTS. If the plaintiffs are successful, then those who have deraigned their title from the plaintiffs are fully protected by both the express and implied warranty of their purchase. As to those who deraign their title from the defendants, suffices to say that no attempt is made to affect these titles; no relief of any kind is asked against any mineral owners, except those named in the complaint, and the plaintiffs would be estopped to question these titles for the reason that they have asked for a monetary judgment against the named defendants for the **value** of those mineral interests which cannot be returned by the named defendants. If, on the other hand, the defendants are successful in this suit, the mineral

grantees are again fully protected under the express and implied waranty of their purchase. The attempt of the defendants to intimate, that because the defendants in their "scheme" hit upon the use of the word "compromise", that Marks had any claim whatsoever to the property is belied by the facts, pleadings and exhibits. In our brief in the Appellate Court we challenged the appellees either in reply brief or at the time of argument to affirmatively declare whether Mr. Marks had any title. This challenge went unheeded. We believe that under the various demands for judgment contained in the complaint that a District Court can render a proper judgment without affecting in any way the rights of absent parties. Later in this brief we will further demonstrate to the Court that the rights of the mineral grantees may not be affected because of the Public Registry laws of the State of Louisiana.

HAVE THE PLAINTIFFS AMENDED THE GRAVAMEN OF THEIR COMPLAINT

Relators have raised the question of the denial of due process of law in contravention of the Fifth Amendment of the Constitution of the United States. Undoubtedly with the hope that the raising of some Constitutional question might impress this Court they argue to the Court that there has been a denial of due process because the Court of Appeals permitted respondents to amend the complaint in brief before that Court.

We submit to the Court that nothing could be further from the facts. We did not ask the Appellate Court for any relief which was not demanded in the original complaint. Actually we have abandoned a portion of our demand in the original complaint, i.e., the cancellation of the mineral lease. However, this abandonment took

place in the District Court. Since that portion of the motion for a new trial and/or amendment of judgment which is re-produced in relator's petition (Page 26) leaves out what we consider pertinent portions we reproduce the motion in full as it is found in the Transcript (R 306).

"MOTION FOR A NEW TRIAL AND/OR AMENDMENT OF JUDGMENT

Plaintiffs,

R. D. Mackintosh
Mrs. Alice Carmichael Mackintosh,
Mrs. Dora Bryant James,
Bryant James
Edward C. James
Emily Lee Graham
Mrs. Amanda Graham Smith
Mrs. Nannie Sadler Graham
Henry E. Graham, and
Rolla E. Graham

move for a new trial and/or for the amendment of the judgment herein rendered for the following reasons and on the following grounds:

1.

That the judgment rendered herein in Chambers in New Orleans dated April 14, 1954 is contrary to the law.

2.

That under the Complaint as is shown in the opinion that plaintiffs sought to set aside and annul:

(a) A compromise agreement dated June 26, 1940 in favor of Henry M. Marks, and

(b) A mineral lease in favor of The California Company.

These being separate and distinct documents.

Plaintiffs also sought to set aside certain transfers of royalty interests and interests in fee simple made by Henry M. Marks to his alleged co-conspirators, and

(c) They sought to recover from The California Company the value of such minerals as The California Company may have withdrawn from the land.

That these various claims were separable and the Court might, after a hearing, have found for the plaintiffs on one, two or all three of the separable claims. That since the claims against the other defendants, except The California Company, do not involve the setting aside of the mineral lease to give them validity, and since there is a claim for a money judgment against The California Company the decree of this Court, which is based entirely upon the proposition that a mineral lease cannot be set aside without making all of the people affected by it parties to the suit is not pertinent to the claims for the return of plaintiffs' property, for the mineral interests thereunder and for reimbursement or accounting to the plaintiffs of the value of the royalties paid, nor is it applicable to the claim for an accounting against The California Company for the minerals which they have withdrawn from the land.

3.

That the decree ordering complainants to make all persons having, or claiming any interest in the lands, mineral lease, or royalties in the property involved, parties to this suit within twenty days, or in default thereof the case will stand dismissed, is too broad and amounts to a dismissal of plaintiffs' complaint on separable claims against which no plea to the jurisdiction of the Court can properly lie.

4.

That the Court was manifestly in error in

> ordering a complete dismissal of the case against any of the named defendants for the reason that as against all of the named defendants allegations upon which proper relief could be given were made which would not involve the non-joinder of indispensable parties and/or want of jurisdiction."

If this motion did not amount to an abandonment of the attack upon the mineral lease, as the Circuit Court of Appeals decided that it did, the motion was certainly sufficient to suggest to the District Court, the error which it had committed in not amending its order of April 14, 1954 so as to protect relator's rights under the various other demands contained in the original complaint.

Frankly, we cannot follow the reasoning behind relator's position that there has been a denial of due process and we cannot understand how the cited case of *Ackerman v. United States*, 178 F. (2d) 983 affirmed 340 U.S. 193, 71 S. Ct. 209, 1950 is at all in point. After quoting this case, respondents continue by saying "to permit such amendment here is to excuse neglect." This statement is certainly not pertinent for we have neither sought to amend our complaint nor have we claimed any "excusable neglect". On the contrary, our position is that within the four corners of the original complaint, demands, properly pleaded, and upon which relief could be granted were set up in detail. Even Judge Hutcheson, in his dissent, stated:

> "That the plaintiffs had and have the right, **without making additional parties,** to sue the defendants in Federal Court for their fraud and requiring them to disgorge their alleged ill-gotten gains, the District Court did not and no one could or can deny". (Emphasis ours)

He continued:

> "If the plaintiffs had, in response to the motion, offered below to amend their complaint to eliminate their claims for cancellation or to affirm the validity against such claims of the titles and rights which would or otherwise might be affected by such claims, the district judge could not, nor would he have refused them permission to do so."

It was therefore Judge Hutcheson's view that it was encumbrant upon the plaintiffs in the District Court, either to amend their complaint by striking out the claim for cancellation, or to affirm the validity of the titles and rights of the various mineral grantees. Such a view is in conflict with the holding in *Seeley v. Cornell*, 74 F. (2d) 353 (CCA 5th Cir.) in which it was stated:

> "The plaintiffs sue for an accounting from their agents and representatives; for a decree for the sums of money due and owing to them by the defendants; for a decree vesting title in them of two-ninths interest in the land described in the bill, or at least the joint possession of same to the extent of two-ninths interest; that the defendant be decreed to be the trustees of the land for their use and benefit and account to them for their two-ninths interest in the proceeds of the said land; and for general and equitable relief.
>
> " * * * It is apparent that the other heirs have no interest in the two-ninths separate share of the plaintiffs in their mother's estate and could not be affected by an accounting by Cornell and it is alleged to be his co-conspirators or by a recovery against them merely as to that interest. To that extent they are not indispensable parties.
>
> "Whether the plaintiffs may maintain the case they allege against Colquitt for an accounting as receiver present more difficulty. We entertain

> no doubt that Colquitt, occupying a fiduciary relation to Mrs. Smith, and after her death to all her heirs, and he has not objected to the jurisdiction of the Court in any way. On the contrary, it appears from the record that he has filed an answer admitting many of the material allegations of the bill. However, this presents but a minor cause of action, not affecting the bill as a whole, and should it later appear that plaintiffs may not sue him as receiver, under the other prayers for specific relief and the prayer for general relief, the Court could proceed to judgment on the other allegations of the bill. *Waterman v. Canal-Lovisiana Bank*, 215 U.S. 33, 30 S. Ct. 10, 54 L. Ed. 80, *Lockhart v. Leeds*, 195 U.S. 427, 25 S. Ct. 76, 49 L. Ed. 263."

We submit that the complaint has set forth separate claims and separate causes of action against each of the named defendants upon which affirmative relief can be granted without doing violence to the rights of any third parties.

And in *Hudson, et al v. Newell, et al*, 172 F. (2d) 848 CCA 5th Cir.) the Court held:

> " * * * We therefore hold that while the full relief prayed cannot be given with only the parties before the Court a limited relief can be, and the suit should be retained to enquire into it."

DOES RULE 54-C FEDERAL RULES OF CIVIL PROCEDURE WARRANT THE JUDGMENT

Rule 54-C of the Federal Rules of Civil Procedure provides:

> "Demand for Judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a

> judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

Even before the adoption of the Federal Rules of Civil Procedure this Court in *Lockhart v. Leeds*, 195 U.S. 427-436, 49 L. Ed. 263-269 stated:

> "There is nothing in the intricacy of equity pleading that prevents the plaintiff from obtaining the relief under the general prayer, to which he may be entitled upon the facts plainly stated in the bill. There is no reason for denying his right to relief, if the plaintiff is otherwise entitled to it, simply because it is asked under the prayer for general relief, and upon a somewhat different theory from that which is advanced under one of the special prayers."

Again reverting to *Seeley v. Cornell*, 74 F. (2d) 353-356 it is stated:

> "It is within the powers of a Court of equity to deprive a party of the benefit of a deed or judgment obtained by fraud without their being set aside."

This being so, may not the District Court order the defendants to return to plaintiffs whatever property they still hold under the compromise agreement, without setting aside and cancelling the compromise agreement itself and render a monetary judgment for that portion which cannot be returned?

Such a judgment could certainly be rendered on the pleaded facts and the demands for relief.

THE PUBLIC REGISTRY LAW OF THE STATE OF LOUISIANA

Relator's petition on this point is concerned with only the effect of the Registry Laws of the State of Louisiana as they apply to mineral **leases.** As we have previously stated we have conceded that the mineral lease to The California Company cannot be cancelled in this proceeding. However, regardless of whether the compromise agreement is cancelled, the mineral lease would still be in force and effect. The lease itself was signed by both the plaintiffs and by Marks and if the compromise agreement was set aside the lease would still be binding, in its entirety, upon the plaintiffs and upon all mineral grantees, for it is provided in the lease (Tr. pg. 28):

> "If the interest of the lessor covered hereby is stated to be less than the entire fee or mineral estate, this lease nevertheless covers all of the interest actually owned by lessor."

We have no quarrel with the decision in *Arnold v. Sun Oil Co.*, 218 La. 50, 48 So. (2) 369 quoted in relator's petition. However, it is not apropos of the present situation. The *Arnold* case was concerned with a mineral **lease.** In the instant case we are concerned with mineral **sales.** That there is a grave distinction has always been recognized by the Louisiana Courts. In *Gulf Refining Co. of Louisiana v. Glassell*, 180 La. 190, 170 So. 846, 849 the Court said:

> "Oil and gas are fugitive minerals, and the owners of the lands which contain such deposits are not the owners of the oil and gas until they reduce these fugitive minerals to actual possession. The owners of land have a real right in their property to go upon it and explore it for these minerals, in order to gain ownership thereof by

securing possession of them. *Federal Land Bank v. Mulhern*, 180 La. 627, 157 So. 370, 95 A.L.R. 948, and *Frost-Johnson Lumber Co. v. Salling's Heirs et al.*, 150 La. 756, 91 So. 207. They may sell this real right separate from the fee of the realty, or reserve this real right when they sell the land, and, in both instances, a real right in the land exists. They may lease this right to a third person who obtains thereby a personal right."

And in the case of *Arnold v. Sun Oil Co.*, *supra*, at page 401, the Court said:

> "The learned Justice ad hoc, relying on the well established jurisprudence of this court, very aptly pointed out that the provisions of the Revised Civil Code with respect to the law of registry, Articles 2251-2266, have no application in this case for the reason 'that the usual oil and gas lease with a cash or royalty consideration, or both, such as the one presently before us, is a contract of letting and hiring within the meaning of the codal articles, and that the lessee in such a mineral lease obtains an obligatory or personal right only, and **not a servitude on realty or a real right in the land.**'" (Emphasis ours)

In *Kaufman v. Arkansas Fuel Oil*, 133 Fed. (2) 787, 5th Cir., (1943) it was stated:

> "It is settled law in Louisiana that a purchaser of such property (a mineral interest) as this need only go to the conveyance records and is entitled to rely absolutely on their disclosure. He cannot be bound by anything dehors those records or contained in unrecorded instruments. The records alone speak and no other notice will do. Revised Civil Code Article 2266." (Explanation ours)

We believe that it is clear that the mineral grantees are fully protected in their purchases, made on the

strength of the public records. They could not be affected by the cancellation of the compromise agreement as between the plaintiffs and the defendants. Having purchased on the strength of the public records their titles may not be affected by any equities existing between the plaintiffs and the defendants. To hold otherwise would be a refusal to give effect to the Registry Laws of the State of Louisiana. In *Blevins v. Sun Oil Co.*, 110 Fed. (2) 566, 567, 5th Cir. (1940) the Court said:

> "For to permit it would be to permit a secret and unrecorded title, the very kind the simple record system of Louisiana is designed to protect against, to prevail over one who purchased, on the faith of the conveyance records, to which alone purchaser must look."

CONCLUSION

We submit to the Court that under the well pleaded allegations and demands of the original complaint, the District Court may render a judgment either cancelling the compromise agreement insofar as it affects the interest of Marks and the other named defendants, or it may order them to re-convey to the plaintiffs their ill-gotten gains. Such a judgment would not affect any of the mineral grantees who, as we have stated above, are protected not only by their warranties and by the recordation laws of the State of Louisiana, but are also protected by reason of the fact that plaintiffs do not seek to disturb their title. Certainly if the Court cannot grant this full relief under the demands of the complaint it can render a monetary judgment against the defendants for the value of the property which was taken from the plaintiff's. We therefore respectfully submit that the judgment of the United States Circuit Court of Appeals for

the Fifth Circuit is eminently correct and the application for writs of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE

I certify that I received notice of the filing of the petition for writs of certiorari in the above matter on November 22, 1955 and that a copy of this brief has been served upon Harry B. Kelleher, Esq., and Thomas F. Jordan, Esq., 1836 National Bank of Commerce Building, New Orleans, Louisiana; George M. Snellings, Jr., Esq., Bernhardt Building, Monroe, Louisiana; W. Dan Files, Esq., Bastrop, Louisiana; E. Leland Richardson, Esq., Reymond Building, Baton Rouge, Louisiana; Wood H. Thompson, Esq., Bernhardt Building, Monroe, Louisiana; George Gunby, Esq., Bernhardt Building, Monroe, Louisiana; and Jerome S. Hafter, Esq., Greenville, Mississippi by placing the same in the United States Post Office at New Orleans, with First Class Postage prepaid, addressed to each of the said attorneys at his post office address.

SAMUEL J. TENNANT, JR.